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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

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IN THE MATTER OF:

S & S AUTO SALES, INC.
Milwaukee, Wisconsin

Respondent.

)
) Docket No. **CAA-5- '99 - 026**
)
)
) Proceeding to Assess
) Administrative Penalty
) under Section 113(d)
) of the Clean Air Act
) 42 U.S.C. § 7413

ADMINISTRATIVE COMPLAINT

This civil administrative action is instituted pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (U.S. EPA) by Section 113(d) of the Clean Air Act ("Act"), 42 U.S.C. § 7413(d), and pursuant to the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. Part 22, against Respondent, S & S Auto Sales, Inc. (S & S), for administrative penalties. The Complainant is, by lawful delegation, the Acting Director of the Air and Radiation Division of Region 5, U.S. EPA, who hereby issues this Complaint.

STATUTORY AND REGULATORY BACKGROUND

1. Section 609(a) of the Act, 42 U.S.C. § 7671h(a), authorizes the Administrator of the U.S. EPA (Administrator) to promulgate regulations establishing standards and requirements for servicing motor vehicle air conditioners.

2. Section 609(c) of the Act, 42 U.S.C. § 7671h(c) provides, in part:

[n]o person repairing or servicing motor vehicles for consideration may perform any service on a motor vehicle air conditioner...unless such person has been properly trained and certified.

3. On July 14, 1992, the Administrator initially promulgated regulations pursuant to Section 609(a) of the Act, 42 U.S.C. § 7671h(a). These regulations have been subsequently amended and are codified at 40 C.F.R. Part 82, Subpart B (40 C.F.R. §§ 82.30 through 82.42 and Appendices A through F).

4. 40 C.F.R. § 82.42(a)(1) states, in part, that

"No later than January 1, 1993, any person repairing or servicing motor vehicle air conditioners for consideration shall certify to the Administrator that such person has acquired, and is properly using, approved equipment and that each individual is properly trained and certified..."

5. Section 602(b) of the Act, 42 U.S.C. § 7671a(b), requires the Administrator to publish lists of Class I and Class II substances containing specified chlorofluorocarbons, respectively, and to add to those lists any other substance that is known or may reasonably be anticipated to cause or contribute to harmful effects on the stratospheric ozone layer.

6. Section 612(c) of the Act, 42 U.S.C. § 7671k(c), requires the Administrator to promulgate rules providing that it shall be unlawful to replace any Class I or Class II substance with any substitute substance that the Administrator determines may present adverse effects to human health or the environment, where the Administrator has identified an alternative that (1) reduces overall risk to human health and the environment and (2) is currently or potentially available, and further requires the Administrator to publish a list of safe alternatives for specific uses.

7. On October 16, 1996, the Administrator promulgated regulations pursuant to Section 612(c) of the Act, 42 U.S.C. § 7671k(c). These regulations are codified at 40 C.F.R. Part 82, Subpart G (40 C.F.R. §§ 82.170 through 82.184 and Appendices A through D).

8. 40 C.F.R. § 82.174(c) states that "[n]o person may use a substitute without adhering to any use restrictions set by the acceptability decision; after the effective date of any rulemaking imposing such restrictions."

9. 40 C.F.R. Part 82 Subpart G, Appendix D, which became effective on November 15, 1996, states, in part, that "[e]ach refrigerant may only be used with a set of fittings that is unique to that refrigerant," and further specifies the criteria those fittings must meet when existing air conditioner service ports are retrofitted.

10. 40 C.F.R. Part 82 Subpart G, Appendix D further states that when performing a retrofit, the person conducting the retrofit must apply to the air conditioning system in the engine compartment a label containing specified information.

GENERAL ALLEGATIONS

11. S & S Auto Sales, Inc. (S & S) is a Wisconsin corporation with a facility located at 9832 W. Appleton Avenue, Milwaukee, Wisconsin.

12. S & S repairs or services motor vehicles for consideration.

13. During 1998, S & S purchased three 25-pound cylinders of McCool Chill-It.

14. McCool Chill-It is a Class II ozone depleting refrigerant substitute blend.

15. Between June 1, 1998 and August 31, 1998, S & S charged an additional 12 to 15 motor vehicle air conditioners with the McCool Chill-It.

16. S & S did not use properly trained and certified technicians to charge the motor vehicle air conditioners with McCool Chill-It.

17. S & S did not retrofit the motor vehicle air conditioners that were charged with McCool Chill-It with the appropriate fittings.

18. S & S did not place the required labels on the motor vehicle air conditioners that were charged with McCool Chill-It.

19. Each instance in which S & S failed to service a motor vehicle air conditioner with McCool Chill-It without using properly trained and certified technicians is a violation of Section 609(c) of the Act, 42 U.S.C. § 7671h and 40 C.F.R. § 82.42(a)(1).

20. Each instance in which S & S failed to install the required unique fittings on a motor vehicle air conditioner it charged with McCool Chill-it is a violation of 40 C.F.R. § 82.174(c).

21. Each instance in which S & S failed to apply a warning label to a motor vehicle air conditioner it charged with McCool Chill-It is a violation of 40 C.F.R. § 82.174(c).

22. On March 24, 1999, Richard C. Karl, Acting Director, Air and Radiation Division, Region 5, issued a Finding of Violation (FOV) to S & S, pursuant to Section 113 of the Clean Air Act, 42 U.S.C. § 7413. The FOV cited violations of Section 609 of the Act, 42 U.S.C. § 7671h, and its implementing regulations at 40 C.F.R. Part 82, Subpart B; and Section 612 of the Act, 42 U.S.C. § 7671k, at 40 C.F.R. Part 82, Subpart G.

NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

23. Pursuant to Section 113(d)(1)(B) of the Act, 42 U.S.C. § 7413(d)(1)(B), U.S. EPA may assess a civil penalty of up to \$27,500 per day for each violation of Section 609 of the Act and for violation of regulations promulgated pursuant to Section 612.

24. Section 113(e)(1) of the Act, 42 U.S.C. § 7413(e)(1), authorizes the assessment of a civil penalty based upon the seriousness and duration of the violation alleged, and after consideration of the size of the business, the economic impact of the penalty on business, the Respondent's full compliance history and good faith efforts to comply, the economic benefit of noncompliance, and other factors as justice may require.

25. After considering these factors, U.S. EPA proposes that the Respondent be assessed a civil penalty of **\$ 8,005**. This proposed penalty has been calculated in accordance with the Penalty Policy for Violations of 40 CFR Part 82, Subpart B: Servicing of Motor Vehicle Air Conditioners ("Penalty Policy"), dated July 22, 1993. A copy of the Penalty Policy accompanies this Complaint.

26. Under the Penalty Policy, a penalty is derived from the sum of the economic benefit of the violation and the gravity of the violation.

27. Under the Penalty Policy, U.S. EPA considers the economic benefit a violator derives from the alleged violations in determining the appropriate penalty. A violator cannot be allowed to derive monetary profit from noncompliance with the Act, both for deterrence purposes and because other regulated entities have incurred expenses in complying with the Act. In this case, U.S. EPA has determined that the economic benefit to S & S, estimated at

\$25, was the avoided acquisition cost for a properly trained and certified technician.

28. U.S. EPA calculated the gravity of the violation by considering the potential environmental harm, the extent of deviation from the regulatory scheme, and the size of the violator. After consideration of the size of S & S' business, U.S. EPA calculated the gravity portion of the penalty as **\$7,980.**

29. Based upon the facts alleged in this Complaint and upon the seriousness of the violations alleged, and after consideration of the size of business, U.S. EPA hereby proposes to issue a Final Order to the Respondent assessing a penalty in the amount of **(eight-thousand five dollars) \$8,005.**

This proposed penalty may be adjusted if the Respondent establishes a bona fide issue of ability to pay or other affirmative defenses relevant to the determination of any final penalty. The proposed civil penalty has been determined in accordance with the Clean Air Act based upon the best information available to U.S. EPA at this time, and in consideration of the nature, circumstances, extent and gravity of the alleged violations. With respect to the Respondent, other factors may mitigate the amount of a final penalty.

30. Respondent shall pay the assessed penalty by certified or cashier's check payable to "Treasurer, the United States of America", and shall deliver it, with a transmittal letter identifying the name of the case and docket number of this Complaint to:

U.S. Environmental Protection Agency, Region 5
P.O. Box 70753
Chicago, Illinois 60673

Respondent shall also include on the check the name of the case and the docket number. Respondent simultaneously shall send copies of the check and transmittal letter to:

Sherry Finley (AE-17J)
Air and Radiation Division
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Tom Williams (C-14J)
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

OPPORTUNITY TO REQUEST A HEARING

31. Section 113(d)(2) of the Act, 42 U.S.C. § 7413(d)(2), requires the Administrator of U.S. EPA to provide to any person against whom the Administrator proposes to assess a penalty an opportunity to request a hearing on the proposed penalty. Accordingly, you have the right to request a hearing to contest any material fact alleged in the Complaint or to contest the appropriateness of the amount of the proposed penalty. To request a hearing, you must specifically make such request in your Answer, as discussed below.

32. The hearing you request regarding this Complaint will be held and conducted in accordance with the provisions of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits", 40 C.F.R. Part 22, a copy of which accompanies this Complaint.

ANSWER

33. To avoid being found in default, you must file a written Answer to this Complaint with the Regional Hearing Clerk (R-19J), U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, within 30 calendar days of your receipt of this Complaint. In computing any period of time allowed under this Complaint, the day of the event from which the designated period runs shall not be included. Saturdays, Sundays, and Federal holidays shall be included, except when a time period expires on such, in which case the time period shall be extended to the next business day.

34. Your Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint, or must state clearly that you have no knowledge regarding a particular factual allegation which you cannot admit, deny, or explain, in which case the allegation will be deemed denied. Your Answer also shall specifically state:

- a. The circumstances or arguments which you allege constitute grounds for defense;
- b. The facts that you intend to place at issue; and
- c. Whether you request a hearing as discussed above.

35. Failure to deny any factual allegation in this Complaint shall constitute admission of the alleged fact.

36. You must send a copy of your Answer and of any documents subsequently filed in this action to Tom Williams (C-14J), U.S. EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604.

37. If you fail to file a written Answer within 30 calendar days of your receipt of this Complaint, the Administrator of U.S. EPA may issue a Default Order. Issuance of a Default Order will constitute a binding

37. If you fail to file a written Answer within 30 calendar days of your receipt of this Complaint, the Administrator of U.S. EPA may issue a Default Order. Issuance of a Default Order will constitute a binding admission of all allegations made in the Complaint and a waiver of your right to a hearing (40 CFR § 22.17). The civil penalty proposed herein shall become due and payable without further proceedings 60 days after the Default Order becomes the Final Order of the Administrator pursuant to 40 CFR §§ 22.27 or 22.31.

38. Failure to comply with an administrative penalty order subjects the Respondent to the provisions relating to the imposition of interest, penalty and enforcement expenses set forth at Section 113(d)(5) of the Act, 42 U.S.C. § 7413(d)(5). Interest will accrue at a rate established pursuant to 26 U.S.C. § 6621(a)(2). The U.S. EPA will also impose a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 10 percent of the aggregate amount of your outstanding penalties and nonpayment penalties accrued as of the beginning of each quarter. You will be required to pay, in addition to all other penalties and interest, the United States' enforcement expenses, including, but not limited to, attorneys fees and costs incurred by the United States for collection proceedings. In such a collection proceeding, the validity, amount, and appropriateness of the administrative penalty assessed shall not be subject to review.

SETTLEMENT CONFERENCE


39. Whether or not you request a hearing, you may request an informal conference to discuss the facts of this action and to arrive at a settlement.

40. Your request for an informal settlement conference does not extend the 30 calendar day period during which you must submit a written Answer to this Complaint. You may pursue simultaneously the informal settlement conference and adjudicatory hearing processes. U.S. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. However, U.S. EPA will not reduce the penalty simply because such a conference is held. Any settlement that may be reached as a result of such a conference shall be embodied in a Consent Order. Your agreement to a Consent Order Assessing Administrative Penalties shall constitute a waiver of your right to request a hearing on any matter stipulated to therein.

41. Neither assessment nor payment of an administrative civil penalty shall affect your continuing obligation to comply with the Act, or any other Federal, State, or local law or regulation.

8/13/99

Date



Margaret M. Guerriero, Acting Director
Air and Radiation Division
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard (A-18J)
Chicago, Illinois 60604

CAA-5-99-026

In the Matter of S & S Auto Sales, Inc.

Docket No. **CAA-5-99-026**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ADMINISTRATIVE COMPLAINT AND NOTICE OF PROPOSED ORDER ASSESSING A PENALTY was sent via certified mail, return receipt requested, to the respondent by placing it in the custody of the United States Postal Service addressed as follows:

Scott Jakubowski, Owner
S & S Auto Sales, Inc.
9832 W. Appleton Ave.,
Milwaukee, Wisconsin 53225

The original and a copy was hand-delivered and filed with:

Regional Hearing Clerk
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

8-17-99
Date

Shanee Rucker
Shanee Rucker, Secretary
AECAS (MI/WI)

Certified Mail No. P140 777 036

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RECEIVED